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ENEMY GOODS AND HOUSE OF TRADE

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Part II.*

THE TROIS FRÈRES (Stewart, V, Adm. Cases, N.S. 1). The continued adherence of the British courts to the doctrine of a *locus pœnitentiæ*, even for persons domiciled in a country which becomes an enemy, is here seen. A Frenchman became naturalized in the United States and traded there. Ultimately, however, he left, with all his books and papers, on a French ship for France, intending to remain there permanently. War supervening between France and Britain, the ship put about, with the intention of returning to America. But she was taken by the British, and the trader's effects seized as prize. Liberty was given him to establish, by affidavit, the total abandonment of his intention of going to France.

THE VIRGINIE (Feb. 7, 1804, 5 C. Rob. 98). Mr. Lapierre was a native of France, and carried on business in New York. Being on a visit of some ten months to (French) San Domingo, he shipped goods there from Bordeaux, and returned to America. There seems to be nothing to show a domicile, and not much to argue a house of trade, in San Domingo. Yet the property was condemned.

Stowell laid decisive stress on Mr. Lapierre's political allegiance; far more, I think, than it could bear. The judgment almost amounts to asserting that, where the allegiance and temporary residence are the same, any business with the country of that allegiance will be liable to involve confiscation. "The native character easily reverts," says Stowell, "and it requires fewer circumstances to constitute domicil in the case of a native subject, than to impress the native character on one who is originally of another country." Yes, but the early return to New York should have negatived the *animus manendi*; and Stowell really admits it when he says: "Had the shipment been made for America, his asserted place of abode, it might have . . . afforded a presumption that he was in St. Domingo only for temporary purposes." But the fact of his early departure not only afforded that presumption, but practically proved it. It is probable that a fuller report would have shown that there was no real and substantial business proved to have been carried on by Mr. Lapierre in America;

* The first part of this article appeared in this JOURNAL for April, 1921, pp. 198-231.

and the case would thus be an illustration of our principle that, if one's house of trade is under one's hat, it becomes highly important where one takes it.¹

THE VROW ANNA CATHERINA (II.) (May 15, 1804). The point was here strongly urged in argument by the King's Advocate and Dr. Laurence (combining for once), which we have already laid stress upon, namely, that we have no case in which, apart from enemy partners, privileged trade or post-war interference, domiciled neutrals established in trade in a belligerent country are considered to be affected *quoad hoc* with the belligerent character. The point seems to have weighed to a considerable extent with the court. The case was one of Dutch East India goods sold by the Dutch East India Company to one Vonte, a Dutchman, and undersold, with the property, to neutrals. Stowell held the transfer valid and *bona fide*. Then, was there anything to stamp a specially Dutch national character on the business and the goods? No; they were but the produce of the soil exported by the planter;² they were not protected by the enemy flag and pass, as ships may be; they were not engaged in a privileged trade in close touch with the government; and, we may add, the trade was not picked up during war, but a traffic made in contemplation of peace.

If the transaction is to be impeached, therefore, it must be on the ground that it is one of those transactions which have such a national bottom and substance, that, without consideration of peace or war, they are exclusively and radically and fundamentally a national transaction; and in which the man who engages in them assumes *pro hoc vice*, the character of that nation.³ Several circumstances approximate it to a Dutch transaction; for, unquestionably, there is a good deal of Dutch agency, and even of Dutch interest throughout; but is it so essentially Dutch that a foreign character cannot be predicated of it?

On the whole, the judge thought not.

It is important and helpful to notice the limitation put by Lord Stowell on the scope of the principle that the produce of enemy soil is enemy goods.

The produce of a person's own plantation, in the colony of an enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation, as a holder of the soil, and is to be taken as a part of that country, in that particular transaction, independent of his own personal residence and occupation.

This provides the answer to many of the conundrums that naturally arise as to the stage at which the produce of the soil loses its inherently

¹ Story disapproved of the decision: see *The Anne Green*, 1 Gall. 286.

² This is important; it provides a limitation to the scope of the principle that the produce of belligerent soil is belligerent. See *infra*.

³ As a *general* definition, not pretending to furnish any concrete tests, it would hardly be possible to improve on this statement.

dangerous character. Not manufacture, not export, is the test—but the fact of passing out of the hands of the grower.⁴

THE JONGE KLASSINA (Nov. 20, 1804, 5 C. Rob. 297). I shall not be suspected of a pun if I say that this is the classical case on the subject. Mr. Ravie was a merchant and manufacturer. He carried on business (seemingly without partners) at Birmingham, Warwickshire, and in Amsterdam. Probably the Birmingham business was mostly manufacture; the Amsterdam business mostly export and import. A British license given to him as “of Birmingham” to “import” goods from Amsterdam was held not to extend to justify him in “exporting” them thence. It is difficult to gauge the real reason for this decision. True, Mr. Ravie had an exporting business in Amsterdam, but surely he would have had to buy from *some* source in Holland, possibly from an exporting house, so why might he not procure the goods from his own establishment. True, the name under which he traded at Amsterdam “Ravie & Co.” was used in the charter-parties; but names ought not to matter. Had there been Dutch partners in the Amsterdam house, the circumstance of the name might have been very material. But the mere fact that the importer Ravie, making his permitted import, happened to use the name of the exporter, who was the same person, ought not to alter the fact that Ravie was doing what he had been told he might do,—get goods in Holland and bring them home. That they were his own goods, ready for disposal in Holland to all customers, should not have affected the question. The government need not have given him a license; but having given it, they ought not to have evaded it by saying that they would look upon him as an exporter instead. That he was carrying on a Dutch house of trade need not be denied; but as a Dutch merchant he was *functus officio* when he handed over the goods to himself for import into England. The observations, however, of Stowell, on Mr. Ravie’s national character are important. He supplies a kind of key to the enigmas which arise in these complicated cases of dual personality, by adopting a suggestion made by the King’s Advocate (Nicholl) and Robinson in argument, that it is the place where the transaction *originates* that confers on the goods concerned in it a hostile character.

It is not said what is his native character, but it is much insisted on that he is settled in this country, and engaged in extensive manufactures here. Mr. Ravie must know, as those who have stated his case know perfectly well, that his meritorious establishment in this country, . . . cannot be permitted to affect this question. A man may have mercantile concerns in two countries; and if he acts as a merchant of both, he must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries.

Stowell has thus taken the plunge and unequivocally adopted the doctrine of identification with, as distinguished from that of unneutral inter-

⁴ Of course, not absolutely. Cf. *The Hope* (27 June, 1809, 1 Acton 44).

vention in, the enemy's trade. We have seen that doctrine, as in a glass darkly, in the appeal case of *Zacharie, Coopman & Co.*⁵ We have seen Stowell apparently relying on the rival doctrine in the *Vigilantia* (1 C. Rob. 1), and we have seen counsel invoking it as a forlorn hope in the *Vrow Anna Catharina* (II). But the *Jonge Klassina* cuts loose from it. There is no question of post-war interference being important any longer. An innocent trader, established in trade in peace time in the enemy's country, becomes *quoad hoc* an enemy unless he puts up his shutters. To have a house of trade there is to be, so far forth, an enemy.⁶

The judge proceeds: "That he has no fixed compting house in the enemy's country will not be decisive; how much of the great mercantile concerns of this kingdom is carried on in coffee-houses. A very considerable portion of the great insurance business is so conducted."

This is a useful observation. When we assert that domicile, for the purposes of prize law, is ordinary civil domicile, the school of Westlake replies, "No; it is mere trading residence." When we ask, What is the use of treating trading residence separately, when having a house of trade is of itself enough to condemn? they say, in effect, "A house of trade means an establishment of bricks and mortar;" which, according to this case, is precisely what it does not mean.

Stowell remarks:

It is, indeed, a vain idea that a compting-house or fixed establishment is necessary to make a man a merchant of any place; if he is there himself,⁷ and acts as a merchant of that place, it is sufficient; and the mere want of a fixed compting-house there, will make no breach in the mercantile character which may well exist without it. Mr. Ravie's own representation is "that he went to Holland for the purpose of arranging his mercantile concerns, and that he has for a long time carried on trade and business at Birmingham." As to his business at Birmingham, I may dismiss the whole of that circumstance, as what cannot admit of a doubt. The question will still remain, whether he is not also a merchant of Holland, in this particular transaction? He says, "that he employs Mr. V. as his agent at Amsterdam, to receive letters,"⁸ and that letters are addressed to him there to Ravie & Company at Amsterdam." This circumstance has

⁵ This JOURNAL, April, 1921, p. 209.

⁶ This is, of course, very far from saying, as Lord Lindley did, with much applause in *Janson v. Driefontein Gold Mines*, that "the national character of a merchant in time of war depends on where he carries on his business." (1902) A. C. 499.

⁷ This is not an essential requisite, though it is common. It is, however, obvious that in practice, the local presence of the trader among the enemy exerts a great influence on the mind of the court. That it is not essential, is abundantly evident from the cases above noted.

⁸ This was in the height of the Napoleonic wars; yet correspondence with agents in Amsterdam was not apparently made the subject, by Stowell, of the slightest futile comment, much less stigmatized as treason. He alluded feelingly to "the difficulties in carrying on correspondence with the enemy's countries" in the *Juffrow Catharina* (March 13, 1804, *ibid.* 142).

been contended to be parallel with the case of Mr. Portalis, who had agents at Bordeaux, and at various other places, whilst he himself was residing at Neufchatel. But there is this distinction which has been overlooked,—that Mr. Portalis did not appear to have been personally present at Bordeaux; he might have agents in different parts of the world, but he himself was resident at Neufchatel. If he had been himself at Bordeaux, that fact might have made a very material difference in his case. What is the situation of Mr. Ravie in this respect? He says, “that he has employed agents at Amsterdam, except at those times when he finds it convenient to go there,” which may be three or five times in a year; at such times I am to suppose that he did not employ agents, but transacted his own business. What is meant by a nominal firm at that place, which I perceive in several passages of these affidavits, I am at a loss to understand, since Mr. Ravie appears to have been as substantially employed in the trade of Amsterdam, as any other mercantile firm of that place.

And in this particular transaction:

The charter-party is brought, not to Mr. V., his agent, but to himself, and he signs it as a merchant of Amsterdam. It would, I conceive, be too much for me to pronounce, that this can legally be done; or, in effect, that a man may go to the enemy's country as often as he pleases, under the authority of a license of this kind, and there act as a Dutch merchant, carrying on the export trade of that country.

This is clearly not Lord Lindley's principle that national character in time of war depends on where a person carries on his business. Personal presence and activity are evidently regarded as very important factors. We may gather from the observations of Lord Stowell that if the claimant had never gone personally to Holland, but had carried on an export business there by his agents, a more favorable view of the transaction might have been taken. This can only mean that in such a case it might have been held that his sole house of trade was in England, and that the Dutch export business carried on in Amsterdam was a mere branch of it. It is difficult to see any rational ground for the distinction; but it supports our proposition advanced above, that if business is carried on in the belligerent country by a principal or uncontrolled manager actually there, not being a business substantially limited to dealing with or through the neutral country with which the principal has paramount business interests,⁹ it will be very difficult to say that we have not to do with a belligerent house of trade.

Of course, the main question in the case is beside our present purpose. Given that Ravie had a status as an enemy Dutch merchant, the question of whether at the time of capture, he was acting as an enemy exporter or as a licensed British importer, is one on which two opinions may be held.

⁹ In the *Jonge Klassina*, the claimant had important business interests in England, but of course that only made the matter worse, as England was not neutral but hostile.

The main feature to be gathered from the *Jonge Klassina* is the prominence of the word "originating." Business, "originating" in the enemy's country, is enemy business. Yet, "originate" is not a conclusive word.¹⁰ If an agent has the idea of a transaction in Baratavia, and furnishes the notion to his principals in Utopia, who act on it as of course, does the transaction originate with him or with them? Supposing, again, that a permanent agent for the sale of English machines in Costa Rica obtains an order from a customer. Does not the transaction "originate" in Costa Rica? It does not appear that the idea of "originating" carries us very far.

The other outstanding feature is the weight attached to the (temporary but habitually recurrent) personal presence and activity in the enemy country of the sole proprietor.

PORTALIS' CASE. It is tantalizing to know that this case is unreported. Search of the records for the papers and the evidence would be well worth undertaking. Portalis was established in Neufchatel. He had agents doing (apparently) general trade in various countries, including Bordeaux. This was held, it would seem, in the early years of the nineteenth century, not to amount to the establishment of a house of trade by him in France.¹¹ It would be all-important to know how these agents and their business differed from Mr. Sontag's agents in *The Indiana*¹² and Mr. Ostermeyer's in *The Portland*.¹³ Was it because the Amsterdam and Ostend agencies had been at one time independent businesses, worked by the proprietors, Sontag and Ostermeyer, themselves? Or was it because the operations were all referable to Neufchatel. Scarcely the latter, as the citation of the case in *The Jonge Klassina* would have been devoid of point.

SIMPSON'S CASE (6 C. Rob. 127). This is only reported in the argument of Sir John Nicholl, LL.D., and Dr. Laurence, in *The Franklin* (*infra*). It was decided, apparently in 1805, by the Lords Commissioners of Appeals, and probably, as usual, under the impulse of Sir William Grant. Three brothers called Simpson were in partnership. The managing partner resided in America, and, presumably on this account, the house of trade was said to be "in America." Another resided in Scotland, and the third in London; and it may be taken that, as usual, residence means domicile. Goods were consigned to the enemy by the managing partner in London, but they were the goods of the partnership, and two-thirds of them were condemned. This determined that house of trade was a secondary criterion to domicile. The neutrality of the business does not matter if the personal domicile is hostile.

¹⁰ As regards this question of "originating," see per Dexter (arg.) and Story in the *San José Indiano*, 2 Gall. 279.

¹¹ See per Stowell in the *Jonge Klassina*, 5 C. Rob. 303.

¹² This JOURNAL, April, 1921, p. 220.

¹³ *Ibid.*, p. 221.

THE FRANKLIN (Diana, Master) (Sept. 13, 1805, 6 C. Rob. 127). Here, again, we have the personal domicile of Mr. W. Bell, living in England, operating to confiscate his share of tobacco belonging to himself and Mr. I. Bell, as partners, carrying on business in America. It is not a question of house of trade, except, indeed, that it might have been urged (as Wheaton, following Story and Marshall, put it in his *Elements*) that, if participation in an enemy house of trade was admitted to outweigh the neutral domicile of a claimant, *e converso* the neutral situation of his house of trade should be admitted to outweigh his enemy domicile. Such a principle would have disestablished domicile as a criterion of all mercantile property. It would have justified Lord Lindley's dictum that enemy character depends on where you trade; but, as Dana rightly comments, there is no inconsistency in condemning in both the cases advanced. Domicile among the enemy furnishes one mode of identification with enemy interests; trading among the enemy furnishes another. It may be reasonable to condemn a person's property on the ground of it being involved in enemy trade, without its being necessarily unreasonable to condemn it in spite of its being employed in neutral trade.

Stowell, indeed, seems to have inclined to Wheaton's view, and to have taken his doctrine from the superior court. "It has been decided by an authority to which this court must bow, that even an inactive or sleeping partner (as it is termed) cannot receive restitution in a transaction in which he could not lawfully be engaged as a sole trader" (*Scit.* on account of his domicile). Of course if he took (as Mr. W. Bell did) an active part in the business, the case was an *a fortiori* one. The case referred to seems to have been that of Simpson (*supra*), referred to in argument by the king's advocate and Dr. Laurence.

Briefly, to state the facts of *The Franklin*: I. and W. Bell were partners. I. Bell was resident, and apparently domiciled, in America. W. Bell was resident, and apparently domiciled, in London.¹⁴ The curious view is taken by the court that their partnership was (like Mr. Ravie's commercial activity) not one house but two houses. There was the American house, "I. and W. Bell," and the English house "John and William Bell." Whether "I" (as is not unlikely) was the initial for "John," or whether "John" was originally the name of some other person, does not matter. Traders, like other people, can call themselves what they like. The partners were apparently the same, as, when the question of severance *quoad* French business is mooted, it is only as between I. Bell and

¹⁴ The reporter's statement of facts states the cargo as claimed "as the property of I. and W. Bell, partners in a house of trade in America, and also 'of' a house in London, where Mr. W. Bell resided, but claimed as the sole property of I. Bell of America." "Of" must surely here mean "in"; the cargo was certainly not claimed as the property "of" a London house.

W. Bell that the matter is discussed. No other partners are even remotely indicated. We have, therefore, I. Bell and W. Bell carrying on business in common under slightly different styles in England and America. It seems, to the present writer, like one business. But the judgment is an authority for the proposition that separate and independent accounts, if coupled with the presence of a partner or "uncontrolled manager," will create a separate house of trade, if general business is originated by the persons in charge.

I. Bell, in America, shipped 70 hogsheads of tobacco from Petersburg, in Virginia, for France; it was documented as, and even sworn and found to be the property of I. and W. Bell. Captured at sea, one-half of it was confiscated as the property of a domiciled British subject, trading with the enemy.

It will be seen that this case raises all the elements of doubt as to what constitutes a house of trade which have perplexed us from the outset. Here are two people carrying on business together; independent accounts are kept, and different styles used, at two different centers,—one partner attends to the one, and another to the other. Is it a house of trade in London? or in America? or in London and America? or is it (as seems to be assumed) two houses, one in each country?

The case furnishes the same kind of negative evidence as we have once or twice observed before, as to what does *not* constitute a house of trade. The whole concern might conceivably have been held to have been an English house, carrying on business by a partner in London, and maintaining an American branch, worked by a partner instead of an agent. In that view, I. and W. Bell would simply be the name by which "John and William Bell" of London were known in America. An international partnership of this kind, consisting of a series of ganglia rather than of a head and limbs, might well be regarded as a house of trade established in any of the countries where it has a nerve-center. However, Mr. I. Bell was not regarded as generally affected with the British character. No one would suppose that he was, merely because he carried on a certain business in London; but the point is, that his London partner also carried on business with him in America. How was it possible to separate the American and the British elements of the joint enterprise? It might be easy in the majority of cases. But suppose I. Bell, in Virginia, wrote to a customer in Liverpool selling him tobacco, and authorizing him to call upon William in London for delivery out of the stock of "John and William Bell." As a partner in that firm, he would be perfectly justified. Would the goods, in the transit from London to Liverpool, be the property of the London "house," or the Virginia one? I. Bell has picked them out of the orbit of the London business and put them in that of the Virginia one. So at least it might be argued. And such perplexities must be frequent,

so long as we try to regard the business carried on by a person or firm as two or more businesses.

THE ELEONORA WHILELMINA (Feb. 27, 1807, 6 C. Rob. 331). This is a minor case; but shows how important the ordinary civil domicile is in estimating national character. Stowell here declared that "Till I am better instructed, I shall hold that the national character of a man who has only just quitted the Prussian navigation, and has his wife and family still resident at Pillau (in Prussia), cannot fairly be considered 'as of the people of Russia,' " although he was master of a Russian vessel and had taken out a Riga "burgher's brief." Evidently the judge agreed with the King's Advocate and Dr. Laurence that "his domicile was still at Pillau."

THE JONGE RUITER (1 Acton 116). Here the claimant had a personal home in Papenberg (a favorite cloak for hostile commerce), where his wife lived and where he sometimes spent half the year himself (being at sea for the rest of his time). It was held he was domiciled there, and that his neutral character was not forfeited by his constant trade with the enemy country (1809). This leniency may usefully be compared with *The Susa* (1799, 2 C. Rob. 251), and *The Jonge Emilia* (1800, 3 C. Rob. 51). The case shows that repeated voyages to a belligerent country are not in themselves sufficient to impart the belligerent character to a shipping venture; they must be coupled with privilege or with the association of enemies in the business, as by repeated charters to enemy merchants.

THE ELIZABETH (16 May, 1811, 1 Acton 57). This case is just cited for counsel's observation that "although the claimants [who had removed from Trieste, on the French occupation, and gone to Vienna] might be accredited persons with the Austrian Government at Vienna, they might yet have an establishment of some commercial kind 'or even a house of trade' at Trieste also." This shows that a house of trade is not synonymous with a commercial establishment.

THE ANN (Feb. 19, 1813, 1 Dodson 221). This is the best deliverance we have on the subject from Lord Stowell. Mr. Smith, a native of Scotland, where his family still resided, went, about 1795, to America and was naturalized two years later. From 1799 to 1805 he was connected with a Glasgow "house of trade" which had "establishments" at New York and Charleston, at each of which places he occasionally resided. His connection with this firm seems to have ceased in 1805, but some time afterwards he bought *The Ann*, an American ship, sailed her twice to Jamaica, and then to London, where she was captured in 1812.

On the principles we have seen laid down in *The Vigilantia*, etc., he had clearly identified himself with America. His "house of trade" was certainly nowhere else. But a difficulty was created by the language of an Order in Council (Nov. 28, 1812), directing that vessels under the flag of the United States, *bona fide* the property of His Majesty's subjects,

of certain specified categories, should be restored to their British owners.¹⁵ It might have been sufficient to say that it was not because he was under the American flag, but because her owner was identified with American trade, that the ship was libelled. The Order in Council could not have been meant to protect ships under the American flag which were confiscable on another ground, *e.g.*, for carrying of contraband. Stowell took the rather different line of declaring that Smith was not a British subject *quoad hoc*. He could not shake off his allegiance, but "for mere purposes of trade"¹⁶ he might acquire a new national character. And "when the vessel is American-built, when the personal residence of the owner, as far as he has any, is in America (for it does not appear that this man at all resided in Scotland), it would be difficult to say that it could be any other than an American transaction." In short, Smith had cut loose from Scotland, except for his lonely wife and family. To the ports of Scotland he never sailed, nor does it appear that he even visited his wife and family in that country. He has been sailing constantly out of American ports. It is not the mere circumstances of having a wife and family in Scotland¹⁷ that will avail him for the purpose of retaining the benefit of his national character for commercial purposes and, incidentally, for prize purposes.

THE ANN GREEN (Oct., 1912, 1 Gall. 274). Joseph Story here fully adopted the principle of domicile (permanent residence) as the grand criterion. Cullen shipped rum from Jamaica to Canada (prior to the War of 1812). He was a British subject, domiciled in the United States, but he made the shipment after an aggregate of four years' stay in Jamaica, and avowedly in the character of a British merchant. Story, calling *The Virginie* "rather strained," held in effect that Cullen had not a house of trade in Jamaica, he made the shipment without being engaged as a general merchant; nor was he domiciled there. So that "although the native character easily reverts," as he agreed, the temporary purpose (debt-collecting) with which Mr. Cullen went to Jamaica, prevented his regaining a British domicile. His rum was meant to liquidate his debts in New York, not to make money. It is impossible not to see that Story was much more lenient here than Stowell had been in *The Harmony*, *supra*, and *The Dree Gebroeders* (4 C. Rob. 232).

Cullen was a Scotchman; came to New York about 1795, at ten years of age; was naturalized in 1804; became a partner of a New York firm in 1807, and went debt-collecting in Jamaica half a year in 1808, about a year in 1810, and from October, 1811, on.

¹⁵ This was a very common practice. It was, I think, begun on the occasion of war with Prussia in 1806 and repeated on various occasions when neutrals became enemies. Cases under the Order in Council in the Prussian case are in the London Record Office, 170 *Privy Council Registers*, 535 (July 2, 1806); and for the American order see 193 *ibid.*, Nov. 28, 1812.

¹⁶ Not "by mere acts of trade."

¹⁷ Cf. *The Harmony*, 2 C. Rob. 325.

THE FRANCES (Feb., 1814, 8 Cranch 335). Here Story held that a merchant, domiciled in an enemy country retains that character until he actually removes. He thinks that the note to *The Ocean* (5 C. Rob. 91), and *The Osprey*¹⁸ prove this. One can only respectfully disagree.¹⁹ Robinson's note only shows the precariousness of relying on intention *merely*.

Mr. Gillespie was born at Glasgow, went to the United States in 1793 and was naturalized in 1798. Next year, he married in Scotland, came to New York with his wife, returning with her in 1802. In 1805 he returned to New York and went into partnership with one John Graham. It was agreed that he should do its business in Britain (as Colin Gillespie & Co.) and that Graham should do it in New York (as John Graham & Company). Mr. Gillespie went to Scotland and accordingly set up "his" house of trade and resided there, not doing general, but only American business, "receiving" consignments of American produce, selling the same and purchasing goods in that market to ship to the United States. Consequently, one would have thought there was one house of trade, and that American, and that only Gillespie's share would have been confiscated. However, the court saw two houses, and condemned the whole shipment as the property of the enemy house.

THE FRANCES (Thompson's claim) (Feb., 1814, 8 Cranch 335). Here, a naturalized American, who set up a house of trade (but not, according to his own account, a domicile *animo manendi* in Scotland, was held to have "acquired a domicile" in that country (which was his native country). It would have been sufficient to hold that he had a house of trade there; and the case would stand alone in attributing to an individual a domicile without *animus manendi*, were it not for the fact that his intention to return rested solely on his own declarations. That is obviously insufficient; and the case is thus reduced to an ordinary one of domicile, similar to *The Venus, infra*.

It is necessary to state the claimant's commercial position. He appears to have been in partnership in America with domiciled Americans; then, in 1801, to have gone to Europe, on the business of the firm (called "his house"). In 1803 he settled in Glasgow, and carried on, up to the War of 1812, and even after its commencement, "that part of the business of the partnership which was to be transacted in Great Britain." Until we know what that business was, we can hardly see in this anything more than an American house of trade, doing business in Scotland through a partner. The partner's share was condemned evidently on account of his domicile *animo manendi*. The shares of the parties domiciled in America were restored. The fact that Thompson did eventually return to America was immaterial.

¹⁸ This JOURNAL, April, 1921, p. 209.

¹⁹ In the *S. Lawrence* (1815, 9 Cranch 120), Story himself still treats the question of withdrawal as an open question.

GILLESPIE'S CLAIM (Feb., 1814, 8 Cranch 363).²⁰ Here great stress was laid on the element of time. In response to detailed questions on further proof being made, it appeared that the claimant had been eight years carrying on the business of a partnership with J. Graham of New York, that his residence in America had been casual and infrequent, and that he had married in Scotland. Held: he had a Scottish domicile. It is clear, from the inquiries so prosecuted, that mere trading residence in Scotland was not of itself sufficient.

THE LOUISA (1814, Inner Temple Folio Prize Appeals [1812-15], fo. 115). Here a Venezuelan went to the States for reasons of health, and embarked on sporadic trade there. His wife and family remained at Caracas, and he only made three shipments altogether. The third, a considerable cargo of indigo, hides, chocolate and provisions, was despatched from an American port, but captured by the British. The Lords Commissioners of Appeal restored it, on appeal. Lushington and Brougham argued for the claimant (Vicente Rodriguez) that he was

a neutral Spanish subject whose national character by birth and domicile is Spanish and whose temporary residence in the United States had no connection with commercial purposes,—but having originated in impaired health was subsequently prolonged against his inclination by a continuance of the same calamity and the prevalence of revolutionary conditions in his own country, which reduced him to great distress and rendered his immediate return impracticable.

The king's advocate (Robinson) and Garrow argue *contra* that

matters of commiseration are difficult. But the question is not whether an alien away from home is not an object of pity. He was settled in the United States, and charters *The Louisa* for a voyage originating and terminating in America. He was living in the United States as a *merchant*, keeping his character [as such] open.

There is a MS. note on the record, "The question will turn on this: was he so abiding in New York as to have lost his original and national Spanish character, and ought he to be considered with reference to this transaction as an American merchant?" This may be a note of some remark of the judges, or a mere note by counsel for the proctor or client. It is neither very useful nor very accurate.

In the result, the Lords of Appeal must have held that he was not domiciled in New York, which is clear, and was not carrying on a house of trade there, which is less clear, but not inconsistent with authority, considering the very few commercial transactions involved in his American career.

This interesting case is nowhere reported.

²⁰ See *The Frances*, *supra*.

THE SAN JOSÉ INDIANO (Oct., 1814, 2 Gall. 268). This case²¹ throws as much light as any on the national character of partners operating in various countries. And it distinguishes pretty clearly between trade and domicile. Here, Story is in entire harmony with Stowell in declaring that "The residence of a stationed agent in the enemy's country will not affect the trade of the neutral principal with a hostile character, yet this is true only of the ordinary trade of a neutral as such, carried on in the ordinary manner. But where such trade is carried on, not on the footing of a foreign merchant, but as a privileged trader, or *by an incorporation with the general commerce* of the enemy in the same manner, and with the same benefits, as a native merchant," it is taken to be hostile.

The unfortunate thing is, that it is left vague by both luminaries, what is the footing of a foreign merchant—the ordinary trade of a neutral, the general commerce of a country! Let us see if we can gather any light from the concrete facts: Britain was hostile; Portugal neutral. There were many claims, analyzed into three classes:

1. Houses in both Portugal and Britain.²² Same partners.
2. Houses in both countries with some common partners.
3. House in Portugal, one partner doing business in Britain.

In the first case, we need to consider that there were "two houses," Dyson Bros. in England, and Dyson Bros. and Finney in Rio. But these had exactly the same partners. The property was going from "the house" in England to "the house" in Rio. In short, it was the property of a partnership which carried on business in the enemy country, if in Rio also. Where the preponderance of business was, and whether either center took up general business or not, we do not know. But it seems to be implied in Story's judgment that the English house was, or might be, the preponderant one. Two persons called Dyson, domiciled in England, and one J. Finney domiciled in Brazil, composed the partnership; and of course two-thirds of its goods were condemned on the ground of personal domicile. But was Finney's share involved? Yes, said the captors, the goods had been shipped at the account and risk of an English house of trade.

Said Story, J.:

It is very clear that, in general, the national character of a person is to be decided by that of his domicile. . . . But the property of a person may acquire a hostile character, altogether independent of his own peculiar character derived from residence. . . . The origin of the property, or the traffic in which it is engaged, may stamp it with a hostile taint, although the owner may happen to be a neutral domiciled in a neutral country.

²¹ The only one (it seems) in which an enemy by allegiance was treated as neutral, until we come to *The Abo* in the Crimean War.

²² These terms are used shortly here to indicate the Portuguese and British dominions respectively, the former including Brazil.

Story thus clearly distinguishes domicile from trading, and implicitly condemns the idea of a specifically "commercial" domicile (except as a convenient phrase to denote the domicile of a person who happens to be a trader). He proceeds to instance entanglement in the privileged trade of the enemy, and the continued use of a vessel in enemy commerce. Such a trade, he adds, has a direct and immediate effect in aiding the resources and revenue of the enemy. It subverts his industries; it affords him taxable objects. Now here was a house of trade, established by British subjects in British territory, and habitually and continually carrying on British trade.

It is true one partner is domiciled in the neutral country; but for what purposes? *For aught that appears, for purposes exclusively connected with the Liverpool establishment.* At all events, the whole property embarked in its commercial enterprises centers in that house, and receives its exclusive management and direction from it. Under such circumstances, the house is as purely British in its domicile (if I may use that expression) and in its commerce, as it could be if all the partners resided within the British empire.

This needs close analysis. The whole judgment appears to be colored by the conception of the Liverpool and Rio businesses as two independent entities, each carrying on a business sufficiently general to enable it to be represented as something more than a mere aspect of the activities of the other. But there are great difficulties in reading Story's language consistently with this supposition. He uses the phrase just quoted, "*its commercial activities*"; and the supposition in question would require "*it*" to mean "the Liverpool establishment." But he has just been speaking of an entity which *had* a Liverpool establishment; not of the Liverpool establishment itself. So that one would think that he referred to the partnership as an undivided whole. Again, it is rather redundant and futile to say that the property embarked in the enterprises of a house has a particular connection with that house; so one would again think that he was referring to the enterprises of the whole partnership, and was declaring that, though it carried the establishments at Liverpool and Rio, its property "received its exclusive management and direction" from the Liverpool center, and was thus affected with a British character.

It seems certain that Story's language is rather confused. We cannot be sure whether or not we have here a case of our proposition that when the preponderant management of a business is in one country, the mere fact that it does business (unless of a general character) in another, and even has a resident partner attending to it, will not make it anything but a single house whose character will be belligerent or neutral according to the character of the place of its preponderant activity; and its "house" or "establishment" in the minor center will be held to be a quasi-agency only. It may be that it is a mere case of the simpler proposition that when

one partnership (or person) carries on two general businesses in two different countries, their national characters will be kept distinct, but the residence of a partner or proprietor in the neutral country (or indeed in any other neutral country) will not exempt his share. It is a pity that we cannot be quite certain on the point, as the former case, though the less probable, is by far the more interesting.

Story recognizes that it is a new fact not found in Stowell's cases, that here we have a shipment from a house in the enemy's country indeed, but made *to* its connected house (and indeed to itself) in the neutral country. But he thinks that makes no difference. As a shipment made by a house in the enemy country on a voyage originating there, the goods must be condemned *en bloc*, without exemption of neutral interests. That would, of course, be so, whether the court saw in the transaction one entity or two. For the starting of the transaction was with the hostile one.

But now comes the second case where the houses differ in composition and an enemy house ships goods to a domiciled neutral partner or to his neutral firm there, and case three where a partner domiciled in the enemy country ships goods of its manufacture to his neutral firm [on its account and risk]. If, in the second case, the shipment by the enemy firm be on its own account, the recipient neutral partner or firm is only its agent, and "the property, in its origin, transit and return, is thoroughly imbued with the enemy character." So in the third case, if the partner in the enemy country is "really engaged in the general commerce of the country for the exclusive benefit of his neutral house," he is simply carrying on a general enemy business for *them*.

The captors, however, argued that a shipment from an enemy country was confiscable, if made to an individual partner domiciled in a neutral country, and for his account and risk.²³ This, Story considered would be to go too far. Transactions do not "originate" in a country when they are originated by mere agents there. And a shipment made by a partner or agent domiciled in the enemy's country to his neutral house as principal, on its exclusive account is equally exempt.²⁴

Another shipment was made by a Manchester firm to Turner, Naylor & Co., Rio, on the joint account of both firms. The share of the Manchester firm was condemned, also one-third of the Rio firm's (which had one out of three partners domiciled in England). So far, good; but another ship-

²³ Or to a neutral house on the like terms. There is some confusion in the case of Dyson. The goods are said to be shipped on account of the Rio house (p. 284) and on account of the English house (p. 289).

²⁴ It is difficult to see, therefore, why (p. 298) the claim of a Rio house of Heyworth should have been rejected. The shipment is made by a house at Liverpool, composed of the same persons as the house at Rio to which it is consigned, and is upon the account and risk of the Rio House. "The case . . . falls directly within the decision" in the case of Dyson and the claim must be rejected. Perhaps "account and risk of the Rio House" ought to read, "account and risk of the Liverpool House."

ment to the same firm at Rio was sent by the order and at the account and risk of the Rio house by J. & J. Naylor of Wakefield. John Todd Naylor was a common partner of both firms; two-thirds were restored, except as regards a piece of stuff which did not appear to have been ordered from Rio, and was condemned. But "there appears . . . such an intricate relation both in blood and business, between the house at Wakefield and the house at Rio," that the judge ordered further proof as to the general connection in business between the two houses, and the terms, manner and circumstances under which those and other shipments had been made. This is difficult to understand, for he had ordered restitution to the neutral partner in the Dyson case, where the partners were precisely the same in both neutral and hostile houses, and could not well be more closely connected.

Then there was an interesting claim by P. F. Archango Dos Querubens, Procurator-General of the Religious Order of St. Antonio. This shows that cargoes do not (as Westlake once unguardedly argued) involve trading and merchants. The shipment was, however, so much mixed up with the goods shipped by Messrs. Naylor on their own account, that further proof was ordered.

We revert to sober commerce. March Bros. & Co., of Rio, had a partner described as "of Liverpool." Although not apparently trading there, his share of the shipment to the firm was confiscated.

With regard to the shipment to Seaton, Plowes & Co., a curious rule is applied, which presumes that in such a case "there are at least three partners entitled to equal shares." Seaton was "of London," "Plowes of Rio," and two-thirds were leniently restored.

The next case is a house within a house. The partners in William Harrison & Co., Rio, were William Harrison of Rio and "the house of A. and R. Harrison & Latham of Liverpool." All parties in the latter house were domiciled in England; so a quarter was restored (*n.b.*, not a moiety).

Francis Sommers of Rio, and the Rev. John Sommers of Mid-Calder, made a shipment on joint account. "If Mid-Calder be, as I presume it is, in the north of England, a moiety must be condemned."

So far we have come across nothing to contradict the conception of domicile firmly held by Stowell. Permanent residence is the essence of it. A "commercial domicile" would have had no meaning for him, except as synonymous with "the domicile of a commercial man."²⁵ Trading is no necessary element in the acquisition of a national character. All that can be said is that if a man sets up business in a country, he is not unlikely to stay there. But we shall now find a case, in America, in which the

²⁵ Dexter puts the point neatly in the *San José Indiano*: "The question is simply as to the commercial character of the claimants. *It is personal, and does not relate to the branch of trade they are engaged in* (p. 277)."

criterion is attempted to be shifted from residence to trading, at any rate by counsel; while Chief Justice Marshall's inexplicable invention of a "commercial domicile" lends color to the same idea. Did Marshall, by "commercial domicile" mean simply the conception of house of trade, independent of residence, or did he have in view residence coupled with commercial activity in the same place? It strikes the investigator that what was really in his mind was an attempt to preserve the single term "domicile" as the criterion of enemy character, whilst including in it (1) true domicile and (2) commercial domicile (*i.e.*, house of trade), in which latter case it is the *business* which (so to speak) is "domiciled" in the hostile territory. Thus, Story J., in the *San José Indiano* alludes to a "house" as being "purely British in its domicile" (if I may use that expression). And Gaston, in argument, in *The Antoine Johanna* talks of a house having a "domicile." And again, "There must be an *animus manendi* to constitute domicile," says the same Dexter in the *San José Indiano* (1814, 2 Gall. 279).²⁶

THE VENUS (March 12, 1814, 8 Cranch 253). This case by no means supports the proposition for which Halleck cites it, that a person *domiciled* (as distinguished from *resident*) in the enemy's country, cannot safely withdraw with his goods on the outbreak of war. All that it decides is that, as long as such persons remain in fact, their property is affected by their actual locality. This is seemingly inconsistent with the leniency shown in *The Ocean*, as will be apparent when we state the facts; but probably it can be reconciled by remembering that the party in *The Ocean* was forcibly detained by the enemy.

Maitland, McGregor & Jones, naturalized Americans, went back to Great Britain and established a "house of trade" there (see per Pitman, *arguendo*, p. 255). But the case does not seem to have concerned the property of that house. Before the outbreak of the War of 1812, they, individually, domiciled in Liverpool, shipped goods to England, asserted to be their joint property in varying shares. The ship was claimed by Maitland and one Lenox, together with considerable cargo. Much of the cargo was claimed by Maitland, Lenox and McGregor, a little for McGregor alone, and a quantity for McGregor & Jones. The goods can hardly therefore be said to be very obviously connected with the house of trade, in which Maitland, McGregor & Jones alone were partners. The case seems to rest on their individual domiciles. Unfortunately the court does not distinguish clearly between domicile and trading. Carried away by the fact that a merchant generally trades where he lives, they occasionally use language which confuses the two conceptions, and gives color to the notion that trade is an essential constituent of prize domicile; thus blurring the two criteria of house of trade and domicile.

²⁶ See also Twiss, *Law of Nations*, II, 306; Pitt Cobbett, *Leading Cases in International Law*, I, 209.

Washington, J., in his leading opinion, gives countenance to the Westlake-Lindley theory that domicile for prize purposes means something short of civil domicile. He adopts Vattel's definition, "a habitation fixed in any place, with an intention of always staying there." He does, however, undoubtedly limit the effect of domicile, by apparently cutting down the liability to confiscation to goods both connected with the place of residence (domicile) and concerned in the trade of the enemy. This is really to adopt as the test of confiscability domicile plus a house of trade. As such it is quite irreconcilable with British theory, which condemns all the goods of a person domiciled in the enemy country, wherever trading (the *Franklin*), and those of a person carrying on a house of trade there, wherever domiciled (the *Jonge Klassina*). Washington seems to repudiate the *Franklin* doctrine, treating domicile, as he does, as the sole test; but he does not appear to have noticed that he was adding to that sole test an additional requirement, *viz.*, that the trade should be carried on in the country of the domicile. He assumes, very naturally but quite gratuitously, that the person is carrying on trade where he is residing permanently. Actual removal, or "bona fide beginning to remove," on the outbreak of war, he expressly says, will change the national character. So that he explicitly allows, instead of contradicting (as Halleck would have it), the position that the person with an enemy domicile may safely quit²⁷ on the outbreak of war. But if the party remains in fact, he must expect unfavorable inferences. And if he waits until his property is captured before taking any decisive steps, he cannot snatch it out of the hand of the captor by subsequent determinations. "The character of the property, during war cannot be changed *in transitu*, by any act of the party, subsequent to the capture." And this, whether the doctrine of *The Danckebaar African* (1 C. Rob. 107) be accepted or not, that it cannot be changed at all.

Story agreed with Washington, though in no detail; and Marshall (I believe, rightly) thought that the claim based on mere intention to return to the country of one's political allegiance ought to prevail. Grotius had placed the identification of a person with the belligerent on his permanent residence.²⁸ Vattel had done the same. Marshall accepts this test, as laid down by Vattel, and we cannot doubt that he meant to accept it *ex animo*; but in his preliminary skirmishing, he does speak of "a merchant residing abroad for commercial purposes," and "intending to continue in the foreign country . . . providing his commercial objects shall detain him [until a hypothetical event].'" Clearly such a residence, meant to come to an end with the completion of particular business, falls short of domicile. But Marshall is not defining the test of enemy character. He is

²⁷ Unless, perhaps, of enemy political allegiance.

²⁸ P. 282. "All the subjects of the enemy who are such from a permanent cause . . . are liable to the law of reprisals. . . . Not so, if they are only trading or sojourning for a little time."

merely instancing a common case as introductory matter. When he gets to definitions, he is quite clear. "A domicile then, in a sense in which this term is used by Vattel, requires not only actual residence in a foreign country, but 'an intention of always staying there.' Actual residence without this intention amounts to no more than 'simple habitation.' " And he proceeds in the strongest terms to deny that mere residence confers the national character. "The intention which gives a domicile is an unconditional intention 'to stay always.' "

What his judgment really amounts to is, not (as Westlake would have it) that one can easily acquire a so-called "commercial domicile" which will give one an enemy character, but that a foreign merchant's residence, contingent, as it must be presumed to be, on the continuance of peace between the two nations, can never amount to domicile at all, unless conclusively proved by his staying in spite of war. This doctrine must surely be erroneous,²⁹ but whether right or wrong, it obviously affords no support to the notion that prize-law domicile is different from civil-law domicile, and is more easily established. Marshall admits that "less conclusive evidence than would seem to be required in general cases, by the law of nations, has been allowed to fix the domicile for commercial purposes." This may have been the case. But he declared that the nature of domicile for prize purposes remained unaltered; it still meant essentially permanent residence, and it does not appear that any of the other judges disagreed with this, or with its applicability as the test of enemy character. What he objected to was the presumption (p. 296) that a merchant of one country settled in another is intending to remain there always. That such a presumption exists is clear (*The Bernon*), that it is reasonable is fairly plain, and it can be rebutted. To stigmatize a domicile based upon it as a "commercial domicile," created by the mere fact of residence coupled with trading, is a potent fallacy. Marshall uses the term "commercial domicile" to mean a true domicile *presumed* (and perhaps often unjustifiably presumed) from the facts of residence and trading.³⁰ Those who rashly cite him in support of the assertion that national character depends on trading residence, use it to mean a new-fangled "domicile" created by trading residence.

We may note that Dexter, in argument, squarely stated that residence plus trading constitutes domicile. This is entirely without support from any decision, nor is any cited. Of course, trade is enough of itself to condemn one's goods without residence.

It is of some importance to note the careers of the parties. McGregor came to America a minor; and, after embarking in business, naturalization,

²⁹ The specific event of war is not necessarily contemplated by merchants when taking up their residence in a foreign country.

³⁰ His whole argument is that such a presumption is inapplicable in the event of war.

marriage and purchase of real estate (residing for twelve years in New York), he went back to Great Britain and in 1805 began business in Liverpool. Says Stockton, *arguendo* (p. 261), "His employment was that of an American merchant shipping goods from England, and receiving American produce there to sell on commission;" and he rightly observes that McGregor's own goods could not be affected by his having English partners. He thus makes the ingenious attempt to represent him in his several capacities, as an American locally in England, but carrying on an essentially American trade. I am not quite sure that the plea would not have succeeded before Stowell. It was not until he sent butter to a strange country, Portugal, that Stowell viewed Grant's proceedings in a serious light in *The Dree Gebroeders*. As above stated, McGregor returned to America ten months after the capture (p. 270), and his delay clearly justified the court in condemning his goods.

Lenox and Maitland had their house of trade (J. Lenox & W. Maitland) in New York, where both were naturalized and held real estate. Lenox remained in New York, but Maitland went to England in July, 1810. In 1811 he took a counting-house at Liverpool and carried on business as "W. Maitland & Co." for himself and his partner Lenox. Were there then two houses, or one house, and were they American or English, or both? It would seem plausible to say that one house alone subsisted (under different names), and that it was essentially an American house. Maitland's share might be confiscable through his personal domicile, Lenox's share for his fraudulent conduct (see p. 276). Maitland was still in England in April, 1813, the capture having been on August 6, 1812. The court, however, seems to have regarded the partnership as a different entity when operating in England from what it was when operating in America. Unlike *The Herman* (4 C. Rob. 228), we have, as in *The Franklin*, a case where the partners are precisely the same; and their English business may have been of a purely American texture, but (seemingly) not confined to the receipt and marketing of goods forwarded by their own American establishment. They had taken up the position in England of English merchants doing a general American trade.

On the whole, it appears an irresistible conclusion that the American court had not quite succeeded in separating the radically different conceptions of domicile and house of trade. They appear to confuse the two, and to assume that where the one is, the other must be also. Harper, indeed, *arguendo* (p. 267), attempts to substitute trading for time as the criterion of what should constitute domicile!³¹

It appears to be to this case, with its failure to distinguish domicile

³¹ And, in *The Frances*, he says plainly, "It is the nature of the trade, not the place of residence, which determines the hostile or neutral character of the trader." (8 Cranch 369.)

from trading, that the subsequent confusion is to be attributed.³² We shall consider ourselves absolved from going at length into the modern cases, and shall only cite one as typical (*The Aina*, *infra*).

SOCIETY FOR THE PROPAGATION OF THE GOSPEL v. WHEELER (October, 1814, 2 Gall. 130). The strongest possible repudiation of the idea that domicile for prize-law purposes is a "commercial domicile" dependent on trading, is found in the present case, decided seven months after *The Venus*, and after full opportunity of discussion. And the judgment is by Story, whose language in *The Venus* and *The Frances* is thus seen to have reference solely to the facts of those particular (mercantile) cases.

A neutral, or a citizen of the United States, who is domiciled in the enemy's country . . . is deemed as much an alien enemy, as a person actually born under the allegiance and residing within the dominions of the hostile nation. . . . And the same principle has been applied to a house of trade established in a hostile country, although the parties might happen to have a neutral domicile; . . . But it is not the private character or conduct of an individual, which gives him the neutral or hostile character. It is the character of the nation, to which he belongs and where he resides. *He may be retired from all business*, devoted to mere spiritual affairs, or engaged in works of charity, religion and humanity, and yet his domicile will prevail over the innocence and purity of his life.

This is conclusive that domicile, for prize purposes, does not mean trading residence.

THE ELISIA. (Inner Temple Folio Prize appeals [1813-14] fo. 472.) The advocates of the theory that place of business is everything in war must find considerable difficulty in the case of *The Elisia* (now for the first time, like *The Louisa*, made public). The owner of ship and cargo (one Davis) was a subject of King George III, and regarded himself as domiciled in Ireland. But his commercial center was certainly nowhere in the United Kingdom. Being at Lisbon early in 1810, he bought an American vessel, got a Papenberg register for her, and christened her *The Elisia*. He went to Waterford in her, and loaded glass for America, proceeding

³² *Murray v. The Charming Betsy* (February, 1804, 2 Cranch 64). This is the case which probably became the innocent cause of the unfortunate expression "commercial domicile." An American non-intercourse act was held not applicable to a person domiciled and trading in Danish territory. Obviously a just decision, if a lenient one, but having no bearing on the subject of prize. For the whole object of the act was commercial, to discourage commercial intercourse between America and France. The whole act being directed to trade, his place of trading was supremely important. The personal domicile was quite immaterial.

Shattuck, the claimant, had done all he could to make a Dane of himself, having even become naturalized. In these circumstances Marshall, C. J., declared that domicile abroad may confer the commercial privileges of the place. But he nowhere says that only "commercial" domicile can confer the character of the place.

The interesting case of *The Constant* is cited from Comynge Reports (677). (Scott v. Schwarz.) English subjects domiciled in Russia were held to be Russians for the purposes of navigation acts. They were "of that country or place."

thither with that cargo. Subsequently, the ship voyaged to Ireland with naval stores, and back with glass and whiskey. She then went again to Ireland, and proceeded to Lisbon and St. Ubes, returning to America; and lastly performed another journey to Ireland and back. War between the United States and the United Kingdom having then broken out, Davis "determined to quit that country" where he was apparently established meanwhile, attending to these various shipments. He loaded *The Elisa* with what property he could collect, and she started for St. Bartholomew, during which voyage she was taken by *The Statira* and *Æotius* as American property.

Davis deposed that he only went to the United States "for convenience," which must surely mean business convenience, and the court, if it had held that the place of business was decisive and that domicile in prize law meant trading residence, must have told him that his civil domicile, even if Irish, did not matter. But the Lords of Appeal (1815) restored him his property, in spite of its American origin, in spite of the master's and supercargo's deposition that he was still living in Bath, U. S. A. The case seems, therefore, a strong authority, like *The Louisa*³³ (and to a certain extent *The Harmony*) that it takes more than a few isolated acts of commerce to constitute a house of trade, even if there be personal presence in the enemy country and no house of trade elsewhere.

THE MARY AND SUSAN (II) (1816, 1 Wheat. 46). In a note to report of this case (p. 54), Wheaton develops the doctrine of so-called "commercial domicile." He squarely defines domicile as "commercial inhabitancy"; thus effectually mixing up the ideas of house of trade and domicile. The strange thing is that he never speaks of domicile as "commercial inhabitancy" in his *Elements*,³⁴ nor does he fail there to distinguish accurately and succinctly between the two conceptions. The effect of such a doctrine as is developed in this note of his, would be to make a house of trade in an enemy country exempt from attack unless the proprietor resided there, which is certainly not the case. Moreover, he cites in support of it the Act of Congress of March 3, 1800, which applies a rule of salvage reciprocity to "the vessels or goods of persons *permanently resident* within the territory . . . of any foreign government," saying no word about trading there.³⁵

³³ This JOURNAL, April, 1921, p. 225.

³⁴ And see work on *Captures* (pp. 102-150), and his elaborate appendix to Vol. 2 of his Reports, especially p. 29. "If his own personal residence be in the hostile country, his share in the property of the neutral house is subject to condemnation." The first text-book which appears to identify prize domicile with trade seems to be Thompson's *Law of War* (1852, p. 27). There was the less excuse for it, as Wildman had in 1850 clearly distinguished trading from domicile, and pointed out that either may involve the attribution of an enemy character (*International Law*, p. 45).

³⁵ See also *The Amado* (1847), Newberry, 400, and *De Luneville v. Phillips* (1806), 2 New Rep., 97.

THE ANTONIA JOHANNA (1816, 1 Wheat. 159). Here we get the common case of two parties carrying on business in two countries under different styles. William S. Burnett was domiciled in hostile British, and William Ivens in neutral Portuguese, territory. They were partners, and called themselves Burnett & Co. in London, and Ivens & Burnett at St. Michaels. These the court treated as two separate "houses." Considering the goods as the property of the Portuguese house, they condemned the share of Burnett because of his hostile domicile. It does not appear that the fact that Burnett was trading in that domicile was regarded as important. And the term "commercial domicile" is quietly dropped.

Wheaton, for the captors, endeavored to condemn Ivens' share also. The partnership was one, wherever it was, and a shipment like this, from the house at London to the house at St. Michaels, though expressed to be at the order and for the account and risk of the latter house, was really a shipment by Ivens & Burnett from themselves to themselves. How could it be called an exclusively Portuguese transaction? One cannot but think the argument entitled to great weight. It is much like that which prevailed in the *Jonge Klassina*.

It may here be added that Gaston, in argument, uses again the curious phrase of "a house" having a domicile. This marks the importance which trading and the place of trade had now reached in American cases. It is further worth notice that Wheaton seems to argue that neutrals trading with the enemy country are restricted to the use of commission merchants and supercargoes. This seems to be inconsistent with *The Anna Catharine*; and, if correct, would prevent a neutral firm from maintaining in the hostile country an agency for the distribution of its own goods. Dexter goes almost equally far in the *San José Indiano* (p. 277).

THE DOS HERMANOS (1817, 2 Wheat. 77). Here it was apparently doubted whether a born subject can by emigration *flagrante bello* reacquire a neutral domicile which he at one time had. But the interest of the case to us lies in the fact that Key, *arguendo*, still upheld the classical doctrine, and urged that the residence and trading of Mr. Green, the claimant, in neutral Carthagená was without sufficient *animus manendi*. The case went off on a point of procedure.

THE FRIENDSCHAFT (I) (1818, 3 Wheat. 14). Here the claimant, Winn, had lived at Lisbon some years prior to 1814, when he went (June 12th) to Bordeaux, leaving his staff of clerks, etc., attending to his business for him. He subsequently came to London, where he was on June 29, 1815, intending to return to Portugal. As he was originally domiciled in England, the captors tried to argue that his national character had reverted, on the strength of *The Virginie*. It is not surprising that they were unsuccessful. Had the captured goods been connected with the business done by him in England, we might have had more light thrown on the subject of house of trade.

THE FRIENDSCHAFT (II) (4 Wheat. 105). This case may be cited because there can be no possible doubt that "domicile" was used in it as meaning permanent residence, totally independent of trade. Moreira, Vieira & Machado, carrying on business in London, had a senior partner "domiciled" at Lisbon. The two junior partners were domiciled in London. Moreira applied for restitution of his share because of his domicile in Portugal. If domicile meant trading residence, he could have stated himself out of court, because he was not trading there. He failed, of course, because neutral domicile does not save one's share in an enemy house of trade. But no one told him that he had not a Portuguese domicile, or distinguished between his "domicile" in Portugal and his partners' "domicile" in England. Story, J., simply says, "The only question is, whether the share of Moreira is exempt from condemnation by reason of his neutral domicile." He does not tell him that his domicile in Lisbon is not a domicile in the sense of prize law at all. He says in effect that it is, but that in the circumstances it does not help him.

ELBERS v. KRAFT (16 Johnson, 128). This case, the last that need be cited prior to modern days, was decided in America in 1819, and clearly shows that the old conception of domicile still prevailed in prize law. No new-fangled "commercial domicile" is referred to, and it is probable that by 1819 it had become apparent that the conception of domicile as a test of enemy character was perfectly distinct from that of trading as a like test. The latter, though often confused with trading residence (commercial domicile), or confused with domicile (the domicile of a house, if I may so speak), was probably by this time analyzed as a thing apart. It is worth setting out the facts, as it is one of the few cases in which the neutral character of the trade was held insufficient to outweigh the belligerent character of the personal residence.

A. and B. had a house of trade in a Swedish island (S. Bartholomew's), but B. was in America doing business and maintaining agents on account of the partnership. Was it a Swedish business, or an American one, that B. was carrying on? It would have been truly interesting to know, but the shipment had no special connection with the business B. was carrying on in America, so the point did not arise. The goods were consigned to A. and B. at St. Bartholomew's, *i.e.*, to a Swedish house of trade. But B.'s share was condemned as American property on account of his personal permanent residence.

"The only question," per Spencer, J., "is, whether Kraft was temporarily here, or whether he was here *animo manendi*. He having remained in the United States for such a length of time [two or three years] the presumption of law is that it was his intention to reside there permanently . . . The absence of all proof that B. was here temporarily, or that he intended to return at any future time to S. Bartholomew's is decisive that he had an indefinite intention to remain here; and especially as he was

actually engaged in superintending the business of his house in their concerns in this country.”

The judge here seems to regard the business carried on by the partnership in S. Bartholomew's and in America as one individual house. It may have contributed to this that Mr. Kraft had no fixed counting-house in America, so that the great preponderance may have lain with the center of the business at S. Bartholomew's. Or the American business may not have been of a general character. From the English case of *The Ann*, a copy of the record of which is in the Inner Temple Library³⁶ we gather that both Elbers and Kraft customarily resided in S. Bartholomew's and were Swedes by national allegiance.

THE AINA (June 21, 1854, Spinks, 316). Here Lushington, D.C.L.,³⁷ gave it as his opinion that where a neutral “continues to reside in the enemy's country for purposes of trade, he is considered as adhering to the enemy, and is disqualified from claiming as a neutral altogether.” This is clearly too wide, and quite inconsistent with Stowell's opinion in *The Anna Catharine*. If he has a house of trade in the enemy's country, it does not matter whether he resides there. If he has not, but resides there for the purpose of carrying on his own foreign trade, he is at perfect liberty to do so; provided, he has no intention of remaining permanently. The *dictum* was not necessary to the decision.

IV. CONCLUSION

The authorities are scanty, so far as the facts of trading go. The principles are vague and elusive. Possibly the whole subject requires re-examination, and the elements of (1) soil, (2) manufacture, (3) distribution, (4) expenditure of profits (domicile), taken into scientific account. Meanwhile it would be a pity that the subject of house of trade should be relegated to the list of those of which it is dangerous to venture on a definition,—like Fraud and Reasonableness. Merchants ought to be able to know where they stand, and should not be exposed to the fluctuations of belligerent prejudice.

³⁶ Folio Prize Appeals (1813-14), fo. 418.

³⁷ It is a current jest in the Temple (not at all justified) that Lushington was “always wrong.” In *The Abö* (*ib.* 349) he made the statement that “in time of war a person is considered as belonging to that nation where he is resident and where he carries on his trade,”—again a very questionable deliverance.